

ASSUMING YOUR CLIENT HAS NO COVERAGE CAN BE A COSTLY MISTAKE

by Marlene L. Allen

Being sued can have a devastating emotional and financial impact on clients, both in their business and personal lives. Having insurance coverage to pay the defense costs and damages can relieve some of the stress. Sometimes it is obvious that coverage should be available, such as when there has been a car accident or a malpractice claim. However, attorneys should find out if there is coverage in all defense situations. And don't expect clients to know whether or not they have coverage. They may not realize that one of their policies provides coverage for a particular claim. For example, in one case, a homeowner's policy covered a claim against an individual who was serving as a board member when she and her club were sued for trespass and nuisance relating to an alleged environmental violation. In another case, an umbrella policy covered a claim against an individual who was sued for slander by a candidate he was running against in an election.

Attorneys can protect themselves from potential malpractice claims by advising the client to tender the claim to all available insurance carriers. Attorneys should obtain copies of the insurance policies to determine if there is coverage or suggest that the policies be reviewed by someone familiar with coverage issues. In any event, clients must be advised regarding possible insurance coverage. Otherwise, the attorney might be liable for the cost of defending the case as well as the judgment, if it turns out that coverage was available, but the claim was never tendered.

"Tendering" the claim means giving notice to the insurance carriers and brokers that might provide coverage. Anyone can tender the claim. Either the client or the attorney should tender the claim immediately, since the carrier is responsible for the costs of defense from the date it becomes aware of the claim, even if it does not accept coverage until a later date. The carrier should be provided with the policy information, the relevant facts, copies of any pleadings that have been filed, and any other information that might be helpful in determining if there is coverage.

Pursuant to the case of *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d 263, an insurance carrier must defend a suit which potentially seeks damages within the coverage of the policy. As long as there is at least one cause of action that has the potential for coverage, the carrier

should accept the claim. (See also *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645.) A liability insurer's duty to indemnify runs only to claims that are actually covered by the policy, while the duty to defend extends to claims that are merely potentially covered. (*Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541.)

Since it might take some time for the carrier to determine whether it will accept the claim, the attorney must proceed to defend and protect the rights of the client in the meantime. The carrier might hire different counsel to defend the insured, but it will have to reimburse the insured for all reasonable fees and costs incurred from the date the claim was tendered.

If the carrier denies coverage, don't stop there. Look at the reasons given for the denial and determine if they are valid. Some companies will initially deny a claim, even if there might be coverage. Since most people will give up at that point, the insurer will have saved the expense of covering that claim. If a carrier is wrongly denying coverage, it may be necessary to bring a declaratory relief action and have a court determine if there is coverage.

If the carrier accepts the defense, determine whether the carrier is agreeing to handle the claim under a "reservation of rights"¹ and whether the client is entitled to *Cumis* counsel.² It is always wise to seek the advice of an attorney familiar with insurance coverage issues to make certain the client's rights are being protected.

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- 1 While an insurance company may be obligated to provide a defense for its insured, it may not be obligated to pay damages for certain types of claims. Therefore, the insurer often provides notice that it is reserving its right to deny the claim later, should facts surface that preclude coverage under the policy.
- 2 *Cumis* counsel refers to an attorney employed by a defendant when there is an insurance policy that potentially covers the claim, but there is a conflict of interest between the insurance company and the insured concerning potential coverage issues. In that case, the insurer is obligated to pay the reasonable cost for the defendant to hire independent counsel. (See *San Diego Navy Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358; see also Civ. Code, § 2860.)